STATEMENT OF

SENATOR WILLIAM PROXMIRE

SUBMITTED TO

THE SENATE ARMED SERVICES COMMITTEE

ON

S. 1264, THE FEDERAL ACQUISITIONS ACT

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Mr. Chairman, I appreciate the opportunity to present my views on S. 1264, the Federal Acquisitions Act. This legislation would establish new rules for the acquisition of materials and services by the Federal Government. In many ways, I am in agreement with the intent of the bill. As I discuss more fully later in this statement, there are many areas where competition will increase as a result of provisions of this bill. The stronger requirements for notification of pending contract awards in the Commerce Business Daily, and the requirements for notification and delay in issuance of sole source contracts should help. The requirement for government payment of interest on its obligations that are due for more than 30 days is a fair requirement, which has been endorsed by the Committee on Banking, Housing and Urban Affairs. Increased use of functional specifications can be beneficial, and should be pursued.

However, I am concerned about many provisions of this bill, and I do not believe that it should be approved in its current form. The recent scandals at the General Services Administration have shown the need for strong controls over government procurement. We have seen that GSA officials have wasted millions of dollars of taxpayers' funds by paying for services that were not rendered, by accepting substandard contract performance, and by over-paying for common commercial items.

In at least three sections, S. 1264 either would allow current practices to continue or fails to deal with the problems identified in the current scandal. Two of these sections,

which provide for continued use of multiple award schedules and establish a "simplified small purchase method," are dealt with later in this statement.

More important, though, is the lack of any provision which would ensure that government officials adhere to government laws and wise purchasing practices. In the current GSA scandals, bribery may be found to be at the bottom of some of the problems, but, in many cases, it may be found that the unwise purchasing practices were not motivated by bribery. They may have been motivated by laziness or inattention on the part of government purchasing and auditing officials, the desire to do a favor for a friend, or any of a number of other causes. Strong provisions which would force government officials to adhere to sound purchasing practices might help to prevent the next government purchasing scandal.

Banking Committee Reviews of Contracting Practices

The Federal Acquisitions Act will completely re-write current laws guiding the acquisition of supplies and services by the government, and will have an important effect on many matters that are of concern to the Committee on Banking, Housing and Urban Affairs. In 1975, the Joint Committee on Defense Production, which I chaired, undertook a review of defense procurement policy and the defense industrial base. Since the Senate reorganization, the Joint Committee was combined with the Senate Banking Committee, and this review has continued.

In the course of this review, the committee studied defense profit policy, Cost Accounting Standards, defense contract auditing policy, the relationship between prime contractors and subcontractors, the unique problems of small businesses, the assignment of claims against the government, and the effect of DoD acquisitions policy on defense costs and on the defense industrial base. We have drawn certain conclusions about the direction in which government acquisitions policy should be directed. In many ways, our conclusions are at variance with the conclusions of the authors of the Federal Acquisitions Act.

Government Contract Competition

On the need for more competition, I am in absolute agreement with S. 1264. However, an arguable corollary to this principle is that government acquisitions policy should be focused so as to attract the largest number of potential competitors. According to this reasoning, government policies intended to regulate contractors can backfire if they have the effect of making the government so difficult to do business with that contractors are unwilling to take on government contract work.

I agree with the statement of the sponsors of S. 1264 that more competition is necessary for government contracts. Every year, the portion of defense contracting dollars awarded through true competition is less than 10 percent of the total procurement budget. Available evidence suggests that most other

federal agencies do no better. The GAO has identified numerous devices by which agencies frustrate the law and initiate unnecessary or undesirable noncompetitive contracting. According to the GAO, federal procuring agencies routinely conclude that only one firm is qualified without seeking additional sources; award noncompetitive contracts solely for the purpose of obligating funds before the end of the fiscal year; initiate contracts based on contracting officers' preference for a specific firm, rather than objective factors; and place unjustified time constraints on procurement offices which mandate noncompetitive contracting. I do not see how any of these abuses would be corrected by S. 1264, with the possible exception of the end-of-year spending syndrome.

Furthermore, the bill as written does not mandate the type of effective contract competition that could assure efficient contracting practices. It is true that the bill does eliminate some of the more flagrant across-the-board exemptions from the requirement for competition. However, for major systems acquisition, it simply states that the Department of Defense and other government agencies should conduct competitions in more or less the same way they are presently conducted. This is through the device known as "competitive negotiation," a form of contracting which has no present legal standing but which would be regarded under S. 1264 as a preferred form of competitive contracting procedure.

S. 1264 does provide some new guidelines for the use of this procedure, but I do not see how "competitive negotiation"

can in any sense be considered a type of effective competition that would justify relaxation of regulatory controls. It will not provide the government with absolute assurance of efficient contractor operations. Competition can, and does, tend to reduce initial prices, but it cannot, in and of itself, control what happens after the contract is awarded. I see nothing in the bill that would mandate fixed-price contracting or effective quality control. I see nothing in the bill that would provide for recompetition of major systems contracts after the initial quantities had been provided for, and I see none of the other"free enterprise" characteristics that would guarantee efficient contracting and justify relaxation of government contracting controls.

As contracting is currently performed at the Department of Defense, once the contract has been awarded, there is nothing but government restraint to protect the interests of the taxpayers and to assure high quality production. The degree of competition with which the contractor had to contend in order to get the contract has almost nothing to do with the contractor's performance after the contract is let.

Attracting Potential Contractors

A point on which I disagree completely with the authors of S. 1264 is the notion that the government must not go too far to protect its interests lest contractors abandon government contracting altogether. I agree that harsh treatment of contractors for its own sake is unwise, but the government must

also protect the interests of the taxpayers. In the review of the defense industrial base, the Joint Committee on Defense Production and the Banking Committee have analyzed the stated concern of DoD that excessive regulations might chase firms away from the business. We searched for any evidence of an unwillingness of contractors to do business with the government. We analyzed the benefits that are provided to government contractors. We talked to representatives of industry, trade associations, the Department of Defense, and the General Accounting Office. What we found is that there is absolutely no evidence to support the assumption that tough government contracting regulations are causing firms to shun government business.

What we have found is that some factors separate and apart from DoD policies have had a limited effect on the availability of suppliers. In some industries, such as metal forgings, environmental and safety restrictions have forced some suppliers to close their doors. Foreign competition, and the flight of U.S. manufacturing firms to other countries can cause supplier shortfalls. But with respect to DoD policies, we have found exactly the opposite of what S. 1264 contends to be true. That is, many firms who are very anxious to do business with the Department of Defense are kept out of the business, not by overly-restrictive regulatory and profit policies, but by DoD favoritism toward large firms.

This notion was supported by the former DoD official most

responsible for analyzing the defense industrial base. His office found that small firm and subcontractor problems are caused by factors external to DoD, such as bankruptcy of firms; by overly-restrictive policies of prime contractors; and by DoD policies which support major prime contractors at the expense of component suppliers and subcontractors.

Simply easing government contracting restrictions and increasing the benefits might not help the constituency that is most in need of assistance. The DoD official testified: "An example of the more harsh treatment (for subcontractors) would be on a program where the contract was awarded cost-plus to the prime and the major high-technology, high-risk subcontract is awarded fixed-price for the subcontractor development; and that is a typical situation that happens today." In other words, benefits intended to make defense business more attractive do not necessarily trickle down to where they are needed.

Any analysis of defense contracting policy would show that defense contracting is attractive business indeed. It is certainly true that contractors must accept certain restrictions, such as Cost Accounting Standards, profit limitations, audit clauses, and other government review and disclosure requirements. However, contractors also reap many benefits. The bulk of major contracts are on a cost-plus basis; contractors obtain progress payment on the basis of costs expended rather than on the basis of actual progress; contractors are protected from inflation and their own mistakes through redetermination clauses,

escalation clauses, and contract changes; they are protected from competition in many ways, through follow-on contracts, certification requirements for potential competitors, restrictive coding of parts for sole source production, and other government policies; their commercial work can be subsidized through government patent policy and payment of independent research and development expenses; and, according to DoD studies, they can be reimbursed through overhead for the costs of bloated, unnecessary marketing and engineering staffs. I don't believe anyone should contend that the government is chasing away firms because it is too difficult to do business with.

Yet S. 1264 ignores this fundamental problem, and instead assumes that if the government relaxes its surveillance and disclosure requirements, contractors will come rushing out of the woods to compete for government business, resulting in such a degree of competition that more will be saved through competition than will be lost through relaxed vigilance.

Ignored is the fact that there are plenty of competent firms trying desperately to compete for government business, and the fact that S. 1264 will allow the government to continue doing business in more or less the same way that it does business now.

Attached to this statement is a section-by-section analysis in which I discuss some more detailed concerns and recommendations.

Section by Section Analysis

-Subsection 2(b)(7) states that it is the policy of the Congress that large scale productions be initiated only after full and complete testing has been completed on the product. I agree with this sentiment wholeheartedly. Many mistakes could be avoided if quality and reliability testing were completed before the production go ahead. However, it would be better if this problem were addressed in the body of the bill.

-In Section 2(b)(10) or in Section 505, which both discuss payments or progress payments to contractors, I would recommend adding a stipulation that progress payments should be keyed to actual progress on a government project. As matters currently stand, progress payments are generally based on funds expended. This violates every commercial principle that I am familiar with. In the commercial situation that may be, financially at least, most comparable, homebuilding contractors must show definite progress and must pass specified milestones before progress payments are made. Enactment of this provision would provide encouragement for contractor cost controls.

-Section 201 establishes criteria for the use of sealed bids. This section reverses current federal policy, which establishes sealed bids as the preferred method of contracting, and then allows 17 specific exemptions to the general requirement. S. 1264 instead makes sealed bids one of four alternative methods, and defines preconditions for the use of each.

The 17 exemptions in current Armed Services Procurement law definitely are too broad. For instance, all contracts with educational institutions are exempt from the requirement for competition, as are all contracts for "personal and professional services," all contracts for drugs and medicine, and all contracts where, in the opinion of the government official, it would be "impracticable" to obtain competition. There is no justification for these broad across-the-board exemptions. I agree with the conceptual point of the authors of S. 1264, that the characteristics of the marketplace should determine whether competition is possible. In addition, I have no conceptual objection to the types of preconditions which must be satisfied. Certainly, it would be ridiculous to pretend there were actual competition if there were not a sufficient number of suppliers to guarantee good competition, or if there were not enough time to offer all interested parties the opportunity to bid.

However, I have two concerns about this section: 1) some of the criteria may be written too vaguely, and may allow the continuation of current abuses; and 2) no provision is made for periodic recompetition of contracts for continuing work such as maintenance or operation of military bases and plants.

To the first point, Subsections 201(3) and (5) are written too loosely. It is particularly interesting to note that two of the problems identified by the GAO in its report on noncompetitive contracting were that agency officials often placed unreasonable and arbitrary time contraints on a procurement which rendered

competition impossible, and that officials often concluded, without seeking alternatives, that only one firm was qualified or willing to produce the product. Section 201 in its current form would not protect from these abuses, and could possibly make it easier for agency officials to evade the requirement for competition.

Secondly, initial competition for a contract is not meaningful if the contractor can do whatever it wants after the contract has been awarded. For many types of contracts, there is no reason that there could not be periodic recompetition. This periodic recompetition would help to assure better performance by the contractor. Under the plan I envision, the incumbent contractor who had performed adequately would still have a substantial advantage over other competitors, if for no other reason than his greater experience. But the requirement for recompetition would act as a check on his performance and pricing. Periodic recompetition is done by the Department of Defense for many operations or maintenance contracts at government-owned contractor-operated plants, government test ranges, and government bases, but there is no reason that this should not be a legal requirement.

-In Sections 203 and 503, I share a concern expressed by the late Senator Metcalf in his dissenting report on this bill. Senator Metcalf argued that these sections allow entirely too much authority for cancellation of contract solicitations. Arbitrary cancellation of a contract can be used as an excuse to negate an instance where an agency official's favored contractor does not submit the best bid. This technique could be used in place of repetitive

solicitations of best and final offers, which can be abusive and has been prohibited by another section of the bill.

Obviously, the government must be permitted to cancel a solicitation in cases where no contractor was responsive to the request, where no satisfactory bids were received, or where the government has decided not to pursue the project, but I would favor language which prohibits cancellations except in specified circumstances.

-Title III defines procedures as to when the government shall use "competitive negotiation" and when it is authorized to issue sole source contracts. This section draws a distinction between these two contracting methods which does not exist in current law. Currently, all contracts not awarded pursuant to sealed bids are considered noncompetitive.

-Sections 301, 302 and 303 provide the basic framework for major systems acquisition. They describe, in general terms, a system of contracting which is currently being installed at the Department of Defense, known as "4-Step Procurement." Four-step procurement is the result of what has become a near-obsession at the Department of Defense with two related problems known as "buy-ins" and "auctions." The problem, as defined by DoD, is that contractors, either through self-imposed or government pressure, submit artifically low bids on government contracts, bids that they know to be unrealistic. It is argued that cost overruns are the inevitable result of these practices.

The buy-in theory mis-states the actual problem with defense contracting. It is not simply that costs escalate from original

estimates. The problem is that defense contracting costs are too high. This has begun to have a serious effect on defense readiness, in that we are faced with the possibility that we may not be able to afford necessary weapons.

Cost overruns, in and of themselves, are certainly a serious problem, because they limit the ability of government planners to make reasonable budgets and projections. However, I do not believe that a program aimed at reducing cost overruns without reducing costs will accomplish much.

Four-step procurement will have this effect. By prohibitiing auctioneering, it will lessen the incentive of contractors to lower their bids, and it may reduce the submission of unreasonably low bids. It may also reduce favoritism by eliminating the syndrome wherein contractors can underbid the initial winner on subsequent bidding rounds. However, it does not appear to be aimed at reducing costs. In fact, a DoD official was quoted in the Wall Street Journal as predicting that 4-step procurement would probably result in increased defense costs. It would reduce cost overruns by raising initial target prices to the levels that are regarded as more realistic.

If you assume that defense costs are pretty good, and that defense contractors operate at maximum efficiency, then it is probably reasonable to support this program. However, I know of no study which suggests that defense contractors operate with very high efficiency levels. On the contrary, the official studies with which I am familiar find exactly the opposite.

I would like to cite two specific studies. Both are official government documents, prepared by elements of the Department of Defense. The first is the Joint DoD/OMB study on aircraft capacity utilization, released in January 1977. This study concluded that excess capacity in the industry was costing the government in excess of $300 million per year. Significantly, though, the study concluded that: "the costs of excess capacity should not be measured solely in terms of idle floor space and equipment, but should also be measured in terms of redundant labor existing in these vertically integrated companies; eg., engineering, management and marketing people. The study found that these extra labor costs far exceed the idle plant and equipment costs."

In follow-up testimony before the Joint Committee on Defense Production, Deputy Undersecretary of Defense Dale Church stated that "For the most part, this cost consists of indirect labor, i.e., engineering, marketing and administrative personnel, retained in anticipation of and to enhance obtaining additional government business. Twenty-five percent or less of the extra capacity costs is associated with under-utilized plant and equipment." The DoD/OMB study recommended limits on the maximum allowable overhead expenses chargeable to government contracts.

Another study, prepared by the Air Force Systems Command, suggests that the rates of inefficiency may be even more serious with respect to direct labor. The study concludes that "Manufacturing costs are about 42 percent of direct costs on a typical production

contract. About 50 percent of this cost represents nonproductive labor caused by inefficiencies of one kind or another. If it were possible to achieve only a 20 percent improvement in labor productivity, approximately one billion dollars could be saved on contracts at 11 of the major Air Force contractors." If it is assumed that other services suffer similar rates of inefficiency, the amount of waste in unnecessary labor would be many billions of dollars.

This study was prepared in 1973, and it is possible that some of the recommendations have been acted upon. However, a perusal of Selected Acquisition Reports and the recent GAO study on Financial Status of Major Federal Acquisitions shows that DoD acquisitions, like most other federal acquisitions, have shown cost growth far in excess of the rate of inflation. Any significant management efficiencies realized as a result of the AFSC study or similar reviews would have acted to hold these costs down.

This failure to deal with the separate and distinct cost problem is, I believe, the most serious failing of S. 1264. The authors of S. 1264 have suggested that increased competition will solve this problem. For some types of contracts, I agree that this may happen. The price of drugs, for instance, which will no longer be exempt from competition, should certainly decline.

But in the area of major systems acquisition, which is the main concern of this Committee, I believe that the ratification of 4-step procurement, the failure to mandate fixed-price contracting, the selective waiver of government surveillance and disclosure

requirement detailed in the bill, the much greater relaxation of controls implied and permitted by the policy statement, and the failure to define a strong management system which would correct the existing inadequacies in cost control, will all combine to frustrate the stated intent of this bill.

We cannot have it both ways in federal acquisitions policy. If it is assumed that any low bid is, by its very nature, a buy-in, then any reduction in bidding estimates that would result from S. 1264 will simply increase the frequency of buy-ins, which will in turn increase subsequent cost overruns. If, on the other hand, it is believed that contract prices are too high and that contractors are not especially efficient, then it is incumbent upon the Congress to take note of this problem in its acquisition legislation.

In Section 102, you could require procuring agencies or the OFPP to prepare a report to Congress detailing efforts to control overhead, improve contractor productivity, and reduce direct and indirect labor costs. In the amendments section, you could add a new subsection to 10 USC 2382 and other code sections providing for contract audit which would require auditors to review the contractors' records to determine whether there is evidence of excessive, redundant, or unnecessary direct or indirect labor expense. The costs for any such claims would not be reimbursed even if otherwise allowable and allocable. Furthermore, you could beef up the audit function, giving the auditors more clout

within their department, improving the competence of their reports, and assuring that their reports will be used.

The definition of cost analysis in Section 305 could be amended by requiring review of what the contract performance actually should cost, rather than simply ratifying the contractor's statement of what it will cost.

Finally, the bill could be amended to stipulate in cases where the contract price has included the rights to drawings and data, that all spare parts must be procured competitively unless sole or restricted sourcing is necessary for safety or other important reasons. Based on a Banking Committee review, which was discussed at recent hearings, this approach could save millions of dollars each year.

-Subsection 302(b)(2) preserves a requirement of current law that any changes in proposal evaluation factors shall be communicated promptly to all competitors. This is a reasonable requirement. Requirements for competition would be meaningless if one competitor received information about the government's wishes that was not available to the others.

However, current law also provides that the solicitation shall be null and void if this notification is not made. I recommend that the committee consider retaining this requirement, as an additional protection. Without this requirement, the competitor who had suffered by not receiving notification of the change would have no recourse.

-Subsection 303(a) prohibits "auction" techniques. I do not favor such broad language outlawing these practices. Auctioneering techniques on major systems acquisitions can be abusive, but I believe there are many instances in which an auction might be the very best way to proceed with government purchases. Base maintenance and similar service contracts, as well as contracts for commercial items could be competed very effectively through the old-fashioned auction. For instance, if the government has a requirement for a certain number of 35mm. cameras, there is no reason that the various distributors of high-quality 35mm. cameras could not sit down in a room and bid for the rights to sell to the government. The government could define the types of cameras that satisfy its requirements, it could read the advertisements for major New York wholesalers in camera magazines, and it could offer anyone who was interested the opportunity to beat the prices offered by these wholesalers. This would be a productive way of saving on unnecessary red tape, and it could promote very economical purchasing practices.

-Subsection 303(e) authorizes the continued use of multiple award schedules by the GSA. Multiple award schedules are a method of buying commercial products without the need to go through a formal competition. The theory is that the government can compare catalogue prices of comparable commercial items and obtain the best price available, while avoiding the red tape of soliciting bids. The abuse by the GSA of this technique is one of the most flagrant examples of incompetence, or worse, that I have ever seen. Recent revelations in the newspapers,

which were confirmed to the Banking Committee by GSA Administrator Jay Solomon, have shown that the GSA has used this technique as a device to waste thousands, if not millions, of dollars of taxpayers' money. The GSA has paid higher prices for cameras, television sets, and typewriters, than any individual would pay for a single item at a discount store. It is incredible that the Federal Government, with its phenomenal market power, is incapable of spending money efficiently.

Two alternatives suggest themselves. The first would be to prohibit the use of multiple award schedules, and to require advertised sealed bids for all commercial products. Alternately, if the committee is persuaded that multiple award schedules can be used properly, the bill could require that this technique be used to buy only from the manufacturer or genuine commercial distributors. If this section remains unchanged, the GSA could revert to its old ways after the current storm has died down, and will continue to waste money buying from the government marketing services who have created these abuses.

-Section 304 allows for noncompetitive exceptions to the general requirement for competitive negotiation. It requires 30-day advance notice of intent to award a sole source contract, and purports to offer other interested parties the opportunity to bid. Although it improves on the current situation, I do not believe that this section will completely control the noncompetitive abuses highlighted by the GAO. The GAO report showed that in many cases, sole source awards were made because

agency personnel had made a predisposition to award the contract in such a manner, rather than because of general market requirements. As Senator Metcalf stated in his dissenting views on this bill: "the subsection ignores one common reality of life: Any potential competitor would know that, if the agency had publicized its desire to award a noncompetitive contract to a preferred source, there is little chance that the agency would look kindly on the entry of another competitor. And, since Section 303(a) allows the government to accept 'an initial offer. . . without discussions when it is clear that the public need would be satisfied on fair and reasonable terms without such discussions,' the agency could execute its contract with the original preferred source without the inconvenience of being forced to consider alternatives."

Given these comments, I recommend that you look particularly closely at this section. At the very least, the government should be required to state its reasons in the Commerce Business Daily as to why only one source can qualify, and should be required, rather than permitted, to seek additional sources when substantial follow-on orders are anticipated.

-Section 305 rewrites the Truth in Negotiations Act, which is one of the most important sources of information about the actual and fair costs of defense procurement. It establishes a formal distinction between less detailed price data and more detailed cost data which does not exist in current law. It is important to understand the distinction drawn by S. 1264 between

cost and price data and analysis. Cost analysis, according to the bill, means "the element by element examination of the estimated or actual costs of contract performance." Price analysis is limited to a review of prices previously paid for similar or identical items.

One necessary correction, which is implied in the bill, would be to stipulate that competitive negotiations are not automatically exempt from submission of cost or pricing data. Staff members of the Subcommittee on Federal Spending Practices have stated that this is their intent, but I believe this matter needs clarification since "competitive negotiations" are considered to be competitive.

Two of the cost data exemptions cause me some problems. The first would require submission of price data only in cases where "the price is based on an established catalogue or market price of a commercial item sold in substantial quantities to the general public." First of all, this exemption may be unnecessary. Under the spirit of S. 1264, I would assume that most commercial products should be procured competitively. In these instances, the nature of the procurement, rather than the item purchased, would totally exempt the contractor from submission of price or cost data, and the selective exemption would be redundant.

However, in the case of noncompetitive procurement of commercial products, exempting contractors from the submission of cost data could be unwise. The GSA purchasing scandal has shown that prices paid for commercial products can be vastly

inflated. Submission of price data would not disclose this overpricing, because previous inflated prices would simply be factored into the new calculations. Submission of cost data would be necessary to protect the government's interest.

The second price data exemption of concern to me is the one which allows submission of price data only in cases where there was a "recent comparable competitive acquisition." This broadly worded exemption could also permit the factoring in to new defense contracts of inefficiencies and cost-overruns from prior contracts. In theory, almost any follow-on contract from other than a sole source solicitation could qualify. This broad new exemption is unwarranted.

-Title IV establishes simplified methods for small purchases. Although I do not disagree with this concept, I am troubled by the vagueness of this provision and the blank check that is given to OFPP to develop guidelines. One particular area of concern is that federal agencies could split larger procurements into parts in order to evade the stricter major purchase guidelines. If this splitting-off were done for the purpose of increasing competition and increasing the ability of small business to compete, then I would favor it; but, if it were done solely to avoid normal contracting requirements, then I would not. I recommend that the Committee consider adding language that would limit option clauses, add-ons, and contract modifications; that would require explicit justification for repetitive purchases from the same source; and that would require a description of why volume purchases at reduced prices are not possible.

Additionally, the recent GSA procurement scandal has shown that predatory contractors can overcharge the government on small purchases as easily as, if not more easily than, they can on large purchases. If the types of sloppy contracting procedures engaged in by the GSA are permitted to continue, then I would look with strong disfavor on provisions exempting small purchases from normal contracting safeguards.

-Section 501 describes types of contracts. Although it states a preference for fixed-price contracts, it actually makes it easier than current law for agencies to issue cost-plus contracts. Current law requires a finding that the use of cost-plus contracting would be less costly to the government and that it would be impracticable to obtain the required products or services under any other type of contract. No such requirement is contained in S. 1264.

The report of the Committee on GovernmentalAffairs cites a Commission on Government Procurement finding that "such determinations are usually speculative, and result in stereotyped findings which merely repeat the language of the statutory requirements." However, I do not understand how the admittedly inadequate limitations on cost-plus contracting would be improved upon by deleting the requirement for a specific finding of need and substituting a vague statement that fixed-price contracts are preferable. If the current protections are inadequate, they should be beefed up, not repealed. This could be done by preserving the requirement for a finding that cost-plus contracting is necessary; limiting cost-plus contracting to

certain specified circumstances; and requiring a detailed statement as to why it is impossible to issue a fixed-price contract and what alternatives, such as splitting off the high-risk portions of the contract, were considered.

This section, with its meaningless statement of preference for fixed-price contracting, does much to undermine the broader case of the sponsors of S. 1264. The intent of the bill to remove contracting safeguards and substitute competition would be rendered meaningless if cost-plus contracting became more widespread. Section 501 would leave this matter entirely to the procuring agency's discretion.

-Section 504 authorizes widespread multi-year contracting. Multi-year contracting is supported by agencies and contractors on the grounds that it can improve the planning process. At the minimum, I would urge the Committee to consider language which would guard against anti-competitive practices. A flat prohibition against sole source contracting for multi-year contracts, and a requirement for recompetition at the end of the contract term should be considered. In addition, the Committee should consider whether multi-year contracting would restrict the effectiveness of the Congressional authorizations and appropriations processes.

-Section 505 authorizes advance, partial, and progress payments. I would recommend that progress payments be based on progress rather than spending. In addition, Section 505 as written would repeal the 1973 Proxmire-Byrd amendment which requires Congressional notification of large advance payments and provides the opportunity for Congressional disapproval.

Several years ago, Senator Goldwater and I introduced a resolution to disapprove a large advance payment on the F-14 fighter program. This resolution was approved, and the payment was not made. I believe that the experience with this resolution shows the wisdom of retaining this provision.

-Section 507 provides for determinations and findings by government officials. It essentially re-states current law. One difference is that current law in many instances requires that the official making the determination state his reasons for making the decision. I am not sure it would be possible to make a determination without such a statement of support, and I do not understand why this requirement is not retained.

-Section 508 provides for enforcement of laws against collusive bidding. I note that this is the only section of S. 1264 which could properly be considered an "Enforcement" section. This section should also establish tough penalties for government officials who wilfully ignore procurement laws. This is the best protection we can provide against favoritism, unsound purchasing practices, and flagrant disregard for the law. The GAO bid protest mechanism, provided in Section VII, simply cannot be effective in providing restitution to companies who are treated unfairly by government contracting officials, because most matters protested to the GAO are, by the time GAO rules on them, a fait accompli. It would be much more useful if we provided a strong deterrent against arbitrary abuses of power.

A related matter which might be dealt with here would be to preserve language from 10 USC 2276, which establishes penalties for any person, whether employed by the government or a contractor, who "deprives the government of the benefits of competition or of a full and fair audit." Although all such laws are extremely difficult to enforce, I believe that their deterrent effect can assure that the laws we pass will not be ignored by agency officials as we have seen in the recent GSA scandal.

-Section 509 provides for the selective waiver of certain government surveillance and disclosure requirements. The waiver is to be granted to firms which have a high percentage of commercial or fixed-price governmental business. This section is an extension of the current Department of Defense program known as CWAS--Contractors' Weighted Average Share in Cost Risk. CWAS currently provides exemptions from government audits of the reasonableness of some indirect overhead costs. Section 509 somewhat restricts contractor eligibility requirements, but it makes all costs exempt from audits for reasonableness and adds exemptions for four additional government surveillance and review requirements. Two of these added categories, Renegotiation and Cost Accounting Standards, touch on matters that fall under the jurisdiction of the Banking Committee.

I have been trying for the past three years to persuade DoD to abolish the CWAS program. The GAO prepared a study of the CWAS program, at my request, which showed that CWAS has not

saved the government an ounce of effort in reviewing contracts, but that it has prevented government auditors from questioning flagrantly unreasonable costs. On the basis of these findings, I believe that any new federal acquisitions act should abolish the CWAS program and prevent its revival, rather than expanding it so that its waivers apply to four additional types of government surveillance and disclosure requirements that are not touched by CWAS.

Changes made since the original version of S. 1264 do make this section considerably less objectionable, but I believe it would be wrong to endorse a section simply because it would do less damage than its original version would have done. Therefore, I recommend that Section 509 be deleted.

-Section 601 provides for delegation of the authorities granted by S. 1264 to agency heads. Although senior agency officials cannot be expected to make all contractual decisions, the bill may go too far in authorizing delegation to lower levels. I recommend that the Committee consider whether certain decisions should be made at higher departmental levels.

-Title VII establishes bid protest procedures. I do not believe that primary reliance should be placed on this technique for assuring sound contracting practices. In bid protest cases that the Banking Committee has reviewed, we have found that the protestor seldom receives any remedy. Even when the GAO finds that agency rules were disregarded, it does little more than suggest that the agency avoid the same mistakes in the future.

In order that Congress could be able to evaluate GAO disposition of protests and agency procurement practices which lead to such protests, I would suggest adding a provision calling for a report by the Comptroller General to the Congress. This report should contain a summary of protest activity, including the number dismissed for various reasons. In addition, this report should contain a GAO evaluation of the salient issues raised by the protests, and a discussion, where appropriate, of agency practices which appear to be generating a significant number of protests. Finally, the GAO should be required to report to the Congress on all agency decisions to proceed with the award of a contract despite a pending GAO protest, and that it should review and report on agency implementation of GAO recommendations.

Another matter related to protests has been brought to the attention of the Banking Committee by a number of small business firms. As you know, many small business firms cannot afford to hire enormous legal and administrative staffs. Evaluation of a government action and preparation of a bid protest can require a significant investment of resources. Every year, between 10 and 20 percent of all bid protests are dismissed on the grounds that they were not filed in a timely fashion. Although the GAO does not break down these statistics by type of firm, I am confident that a high percentage of these dismissals are suffered by small business firms. I recommend that the Committee consider allowing a slightly longer time period for small business firms to file protests in recognition of their limited legal resources.